SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

No. 73-1079

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The decision and order of the National Labor Relations Board (Pet. App. A1-A4) [1] are reported at 201 NLRB No. 42.

[1] The petition omits the Administrative Law Judge's decision, which is set forth at S.A. 20-34. "A" and "S.A." refer to the appendix and the supplemental appendix to the briefs in the court below.

534-489—74——1

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1973 (Pet. App. A5–A6), and the Union's petition for rehearing *en banc* was denied on October 11, 1973 (Pet. App. A7). The petition for a writ of certiorari was filed on January 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the Union picketed with a recognitional or organizational objective, in violation of Section 8(b)(7)(C) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A8–A9.

STATEMENT

Samuel E. Long, Inc., a general contractor in the building and construction industry, does not recognize or have a collective-bargaining agreement with any labor organization (S.A. 21; A. 66). Long's regular complement of about 50 employees, who have no "craft" classifications, normally performs certain types of work on a construction project (*e.g.*, excavation work, structural steel work and concrete work). Long normally subcontracts some of the other work (*e.g.*, boilermaking work, electrical work and elevator work.) The remaining work may be performed by Long's own employees

or by subcontractors, depending on the size of the job (S.A. 21; A. 65–70, 75–77).

In May 1971, Long began construction on a high school in West Chester, Pennsylvania, assigning some of the work to its own employees and subcontracting the rest; 12 of the subcontractors recognized unions and 8 did not (S.A. 22; A. 62, 64–67, 72). On December 7, 1971, petitioner Council wrote Long that it would picket the school construction site if it did not sign the Council's subcontractors agreement[2] (Pet. App. A16–A17; S.A. 22; A. 42–43, 137). Long did not reply to the letter (S.A. 23). On January 24, 1972, the Council commenced picketing at the school construction site with signs bearing the following legend (Pet. App. A17; S.A. 23; A. 72):

> *Sam Long* Contractor Refuses to enter into a Sub-Contractors Agreement with the Philadelphia, Pennsylvania Building & Construction Trades Council, AFL–CIO

The picketing was supervised by Robert Williams, a Council vice-president, and Charles Boyer, chairman of its Delaware County Committee (S.A. 23; A. 17, 30–33). On the Council's instructions, Williams and

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[2] Such an agreement would have obligated Long to subcontract only to contractors having collective-bargaining agreements "with a member union of the Council who is the recognized collective bargaining agent of the particular trade" (S.A. 27; A. 138). The agreement would have been effective from year to year unless either party gave 90 days' written notice of its desire to change any of the terms. It would have required that Long post a list of its subcontractors on each job, and that disputes under the agreement be arbitrated by an arbitrator empowered to award compensatory and "deterrent" damages (A. 138–140).

Boyer met with three school officials to ask them to erect a sign directing construction workers to the construction entrance, so that there would be no disruption of the activities of the adjacent junior high school (S.A. 23, 25; A. 20–22). During the meeting, one of the school officials asked Williams why the Council was picketing. Williams replied, "It is organizational" (Pet. App. A2; S.A. 23, 24; A. 13–17, 23). Another school official asked if they were there to organize Long because he is "non-union." Williams replied, "Yes," and Boyer nodded his head affirmatively (Pet. App. A2; A. 17–19, 23).

The picketing continued for more than 30 days, without any representation petition being filed under Section 9(c) of the Act, 29 U.S.C. 159(c) (S.A. 23–24; A. 72–73).

The Board found that the Council violated Section 8(b)(7)(C) of the Act by picketing with a recognitional objective since "subcontractor's agreements such as proposed by Respondent [Council] do relate to, and substantially affect, the terms and conditions of employment of the employees of the general contractor from whom the agreement is sought * * *" (S.A. 29). The Board also found that the picketing additionally violated Section 8(b)(7)(C) because the uncontradicted statements of Williams and Boyer showed that the Council "had a further object of forcing or requiring * * * [Long's] employees to accept or select * * * [the Union] as their bargaining representative * * *" (Pet. App. A3). The Board entered an appropriate order (Pet. App. A3–A4), which the court of appeals enforced (Pet. App. A5–A6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of other courts of appeals.

1. Section 8(b)(7) of the National Labor Relations Act, 29 U.S.C. 158(b)(7), makes it an unfair labor practice for a labor organization or its agents to picket any employer where:

> an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative * * *.
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing * * *.

The basic question presented by the petition is whether the Board properly concluded that the Council, in picketing Long for an agreement restricting his ability to contract out work which his employees could perform, had an objective of forcing or requiring Long "to recognize or bargain with" the Council, within the meaning of Section 8(b)(7)(C).[3] The court below correctly concluded that it did.

[3] In any event, the Council's picketing would still violate Section 8(b)(7) because of the Board's alternative finding, which is supported by substantial evidence (*infra*, pp. 8–9), that the Council was seeking to organize Long because he was "non-union".

In Section 8(b)(7), Congress outlawed any picketing which is intended "to establish a continuing contractual relationship with the employer with regard to matters which could substantially affect the working conditions of his employees, and which are the proper subject of bargaining by a lawfully recognized exclusive representative of those employees." *Lane-Coos Building & Construction Trades Council* v. *National Labor Relations Board*, 415 F. 2d 656, 658–659 (C.A. 9); accord, *Dallas Building & Construction Trades Council* v. *National Labor Relations Board*, 396 F. 2d 677, 680–681 (C.A.D.C.). The subcontractors agreement which the Council sought to compel Long to sign would have had this effect. Long's employees have a direct interest in the extent to, and the circumstances under, which the work they perform is to be subcontracted. Cf. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203. The agreement would have required Long, at least for one year, to subcontract only to firms having labor agreements with unions affiliated with the Council, to post a list of subcontractors on each job, to "cooperate" with the Council "in every possible way towards furthering the interests of both parties," and to submit all disputes to binding arbitration (A138–A139).

This agreement could affect the job interests of Long's own employees in a number of ways. As the Administrative Law Judge found, the requirement that Long use only subcontractors recognizing unions affiliated with the Council would limit Long's choices in a way

that could affect the opportunities for work of his own men (S.A. 29). Moreover, the right of Long's own men (should they become organized) to bargain on their own with respect to subcontracting is a right which they might—at least—trade for other improvements in wages and working conditions (S.A. 28–29). In seeking so substantially to affect Long's employees' terms and conditions of employment, the Union here had a recognitional objective.

2. Contrary to petitioner's contention (Pet. 8–18), the decision of the court of appeals is not in conflict with those of other courts. The two other courts of appeals which have decided the question have likewise held that picketing for an agreement restricting a general contractor's power to subcontract work has a recognitional objective within the meaning of Section 8(b)(7). *Dallas Building & Construction Trades Council, supra; Lane-Coos Building & Construction Trades Council, supra.*[4]

The decision does not conflict with *Essex County District Council of Carpenters* v. *National Labor Relations Board*, 332 F. 2d 636 (C.A. 3), and related cases (Pet. 9–11) holding that picketing to obtain a subcontracting agreement of the type here involved does

[4] The Council attempts (Pet. 25–26) to distinguish *Dallas* and *Lane-Coos* on the ground that they involved a violation of Section 8(b)(7)(A) (Pet. App. A8), not of Section 8(b)(7)(C). Yet paragraphs (A), (B), and (C) are "subordinate to and controlled by the opening phrases of Section 8(b)(7)." *Int'l Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, 1159. Thus, if picketing for a subcontractors agreement is recognitional for purposes of Section 8(b)(7)(A), it is recognitional for purposes of Section 8(b)(7)(C).

not violate Section 8(b)(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A). Section 8(b)(4)(A) bars the exertion of economic force for the purpose of compelling an employer "to enter into any agreement which is prohibited by section 8(e)". Since the first proviso to Section 8(e) (Pet. App. A10) exempts "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * *," picketing to obtain such an agreement would not violate Section 8(b)(4)(A). It does not follow, however, that such picketing would not violate other provisions of the Act (see *Dallas Building & Construction Trades Council, supra,* at 682), and, as we have shown, it does in fact violate Section 8(b)(7).

Finally, the Board's decision here is not inconsistent with *Int'l Bro. of Electrical Workers, Local Union No. 903* (*Pass Development*), 154 NLRB 169, or *Building & Construction Trades Council of Metropolitan District* (*Winwake, Inc.*), 141 NLRB 38 (Pet. 15–17). Those cases are "clearly distinguishable not only because the union did not seek to enter any continuing agreement with the employer, but also because the subcontracted work was not also performed by the general contractor's own employees." *Dallas Building & Construction Trades Council, supra,* at 683.

3. Petitioner's contention (Pet. 26–28) that the evidence does not support the Board's further finding that its picketing also had an organizational objective merely

presents an evidentiary issue which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490. In any event, the record amply supports the Board's finding. Williams and Boyer, who were high-ranking officials of the Council and thus "had at least apparent authority to state the purpose of the picketing" (Pet. App. A3), frankly admitted to school authorities that an objective of the picketing was to organize Long (*supra,* pp. 3–4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1974.

U.S. GOVERNMENT PRINTING OFFICE 1974